91-719

NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

– versus –

RICKY HAROLD RALEY — RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fourteenth Amendment requires the Commonwealth of Kentucky to prove by clear and convincing evidence, the validity of a prior conviction offered for sentence enhancement. Additionally, whether the state may carry its burden of proof by use of a presumption in light of Boykin v. Alabama, 395 U.S. 238 (1969).

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Comes the Respondent, Ricky Harold Raley, by counsel, and responds to the Petition for Writ of Certiorari filed by Al C. Parke, Warden of the Kentucky State Reformatory and the Attorney General of the Commonwealth of Kentucky for review of a Judgment of the United States Court of Appeals for the Sixth Circuit granting the Respondent a conditional writ of Habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit [Appendix cited as A-3-A21] (A3-A-21) is reported as Raley v. Parke, ____ F.2d ____ (6th Cir. 1991). The opinion of the United States District Court for the Western District of Kentucky is not reported. (A21-A25) (March 15, 1990). The opinion of the Kentucky Court of Appeals affirming the conviction is not reported (A26-A-33) (April 22, 1990). By order entered June 21, 1988, the Kentucky Supreme Court denied Respondent's motion to review the opinion of the Kentucky Court of Appeals. (A7).

JURISDICTION

The United States Supreme Court has jurisdiction to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. 1254(1). The judgment that the Petitioner seeks to have reviewed is a decision of the United States Court of Appeals for the Sixth Circuit styled Raley v. Parke, ____ F.2d ____ No. 90-5446, [Appendix cited as A3-A21] affirming in part and reversing in part a judgment of the United States District Court for the Western District of Kentucky, Civil Action No. C-89-0756(L)(A) (A21-A-25). The United States District Court had jurisdiction pursuant to 28 U.S.C. 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner has asserted that the constitutional and statutory provisions involved are as follow: (1) the due process clause of Section 1 of the Fourteenth Admendment of the Constitution of the United States and, (2) Title 28 U.S.C. 2254. The respondent agrees with the Petitioner.

COUNTER STATEMENT OF THE CASE

The Respondent, Ricky Harold Raley, filed an application for a writ of habeas corpus with the United States District Court for the Western District of Kentucky attacking his conviction in the Commonwealth of Kentucky as a Persistent Felony Offender. Mr. Raley asserted that the Commonwealth of Kentucky violated his right to due process because the Commonwealth did not produce sufficient evidence to establish clearly and convincingly that he knowingly and intelligently waived his rights when he pled guilty to prior criminal acts that were the basis for the Persistent Felony Offender conviction.

PROCEDURAL HISTORY

On May 28, 1987, the Respondent, Ricky Harold Raley, entered a conditional plea of guilty to charges of second degree robbery and first degree persistent felony offender. Before entering his plea, Mr.

Raley had motioned the trial court to suppress his prior convictions as evidence of persistent offender status and that motion was denied.

There were two prior convictions sought to be used as evidence by the prosecution to show proof of Respondent's persistent felony offender status. The first conviction was entered on January 3, 1980, in case No. 79-CR-1214 and imposed a sentence of five years on each count of a three count indictment for burglary. The second conviction was entered October 8, 1981, in case No. 81-CR-0269, and imposed a sentence of five years for third degree burglary, and of being a second degree persistent felony offender. The convictions were obtained in each of the above described cases as a result of guilty pleas.

The motion to suppress the introduction of these convictions into evidence was based upon Mr. Raley's claim that the pleas were not entered voluntarily. There was no evidence in the record that Mr. Raley waived his right to a jury trial, his right to remain silent, his right to confront witnesses against him, and/or other rights guaranteed to him under the United States Constitution.

A hearing was granted on Respondent's motion to suppress. At the hearing, the prosecution filed certain copies of the judgments in the 1979 and the 1981 cases. The trial court then advised Respondent

that this caused the burden of going forward to shift to him. Respondent submitted that under the precedents of the Kentucky Supreme Court, the trial judge correctly stated the law. However, Respondent advised the Court of his written motion which maintained that under federal law where the record is silent as to a colloquy between the defendant and the court pursuant to a guilty plea entered, the convictions are presumed constitutionally invalid. In order to comply with the Kentucky law, appellant then produced evidence through his own testimony. The prosecution, for its part, relied on cross-examination of the Respondent and on the testimony of one of the trial attorneys who had previously represented Respondent.

After the State trial court denied Mr. Raley's motion to suppress, he entered a conditional guilty plea in which he reserved the right to appeal the determination of the trial court concerning the motion to suppress the PFO conviction.

The Kentucky Court of Appeals affirmed Mr. Raley's conviction in a slip opinion rendered April 22, 1988. Raley v. Commonwealth, 87-CA-1359-MR, "Not to be Published". Relying upon Dunn v. Commonwealth, Ky., 703 S.W.3d 874, 876 (1985), cert. denied, 107 S.Ct. 121, the Kentucky Court of Appeals found that the trial court

properly placed the burden of production upon Mr. Raley. Relying on other cases, the Kentucky Court of Appeals concluded that the Commonwealth met its burden of proof concerning the validity of Mr. Raley's prior guilty pleas. The Dunn case was subsequently disapproved by the Sixth Circuit on federal habeas review, in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 108 L.Ed.2d 778.

The Kentucky Supreme Court subsequently denied review.

Mr. Raley thereafter filed a Petition for Habeas Corpus with the United States District Court for the Western District of Kentucky.

After ordering the record to be supplemented with additional documentation concerning the guilty pleas of 1979 and 1981, the United States District Court, Western District of Kentucky at Louisville, denied Mr. Raley's Petition for Habeas Corpus. Respondent filed his notice of appeal on March 21, 1990, and the United States District Court issued a certificate of probable cause that same day. Mr. Raley's case was then heard by the United States Circuit Court of Appeals for the Sixth Circuit, and a conditional Writ of Habeas Corpus was granted. The Commonwealth has now filed a petition for a Writ of Certiorari with this Court.

ARGUMENT

Mr. Raley contends that Boykin v. Alabama, 395 U.S. 238 (1969) and Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1538 (1990) required the Sixth Circuit to find that his plea was not entered knowingly and intelligently. Raley correctly argued that according to Boykin, because no transcript of either his 1980 or his 1981 plea proceedings exist, the Commonwealth thus has the burden to prove that he knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent. Boykin, 395 U.S. at 243. Mr. Raley also argued that in Dunn v. Simmons, supra, the Sixth Circuit established that a state may not carry its burden under Boykin by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. Dunn, Id. at 1277.

Mr. Raley concluded that Kentucky did not produce enough evidence to establish clearly and convincingly his knowing and intelligent waiver of his rights. The fact of the silent record, combined with his testimony, created a strong suggestion that he was not aware of his rights when he waived them.

Mr. Raley submits that the Sixth Circuit is correct in its decision in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990) and its decision herein. Raley v. Parke, ____ F.2d ____ (6th Cir. 1991). This case is squarely grounded upon the decision in Dunn v. Simmons. The Sixth Circuit in its opinion specifically states:

> "Our decision in Dunn governs the disposition of this case." (A12)

The court could not make itself more clear. The United States Supreme Court has denied certiorari of Dunn v. Simmons, and should likewise deny certiorari here.

THE WRIT SHOULD NOT BE GRANTED

Rule 17 of the Rules of Court for the Supreme Court of the United States sets forth the considerations to be weighed in determining if the Supreme Court should accept a case for review. Rule 17 is not controlling on this court, but it does reflect that review on a writ of certiorari is not a matter of right, but of judicial discretion, which will be granted when there are special and important reasons therefor.

The Respondent submits that there are no special and important reasons for reviewing the decision of the Sixth Circuit. The Sixth Circuit's decision is squarely based upon its previous decision in Dunn v. Simmons, which this court decided not to review in 1990.

The only issue being raised is whether the Sixth Circuit is correct in its finding that pursuant to Boykin v. Alabama the Commonwealth has the burden of proving previous convictions by clear and convincing evidence. This issue is not of great importance because the Circuits are not in conflict over this issue. Almost if not all of the cases cited by the Petitioner are irrelevant, dealing either with the burden of showing that a prior conviction should not be counted under the criminal history calculations of the guidelines or when issues in habeas proceedings differ from those examined in Boykin.

The Sixth Circuit in its opinion states:

> In habeas challenges to the validity of a guilty plea, however, courts uniformly assign to the state [after petitioner shows noncompliance with the requirements of Boykin] the burden of showing that the guilty plea was obtained constitutionally. Fox v. Kelso, 911 F.2d 563, 569 (11th Cir. 1990).

The Commonwealth asserts in its petition that a majority of the Circuits are in conflict with the Sixth Circuit's opinion in this case. The Respondent has read their petition and reviewed the cases cited

and fails to find what cases the Commonwealth relies upon for this statement.

The cases cited in its petition are substantially the same cases cited in its Brief to the Sixth Circuit except for twenty (20) or so cases from state courts and numerous cases from the Eleventh Circuit that are collected in Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990), the case cited by the Sixth Circuit in its opinion.

The Commonwealth attempts to show that the Sixth Circuit's reliance upon Fox v. Kelso is improperly placed and that the Ninth Circuit is in conflict with the Sixth Circuit by citing U.S. v. Pricepaul, 540 F.2d 417 (9th Cir. 1976) and U.S. V. Goodheim, 651 F.2d 1294 (9th Cir. 1981). This reliance is severely misplaced as the Ninth Circuit in Goodheim, reaches the same conclusion at which the Sixth Circuit arrived. In Goodheim, Id., at 1299, the Ninth Circuit stated:

> In Boykin, the Court held that a sate court may not constitutionally accept a guilty plea without an affirmative showing that the plea was voluntary and intelligent. 395 U.S. at 243, 890 S.Ct. at 1712. A silent record does not require automatic reversal; the government may prove that the plea was voluntary and intelligent at an evidentiary hearing. Wilkins v. Erickson, 505 F.2d 761, 764-65 (9th Cir. 1974). In Pricepaul, we reluctantly held a silent record sufficient both to rigger an evidentiary hearing and to

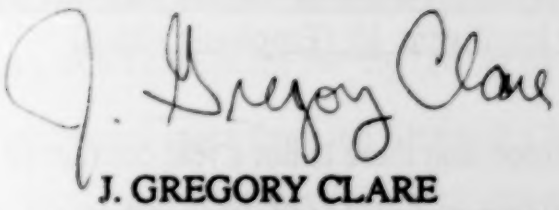
> shift the burden to the government to prove that the plea was voluntary and intelligent. 540 F.2d at 423. We further indicated that, had we not been constrained by Boykin, we would have preferred to require, in addition, an affidavit from the defendant specifically alleging that the plea was not voluntary or intelligent. Id. (Emphasis added)

It is submitted that there is not a real conflict of opinion between the Courts of Appeals as to the issues decided by the Sixth Circuit in Raley v. Parke. It has long been held that certiorari to review decisions of the United States Court of Appeals in cases such as this, are only granted where a "clash" of opinion in the Courts of Appeals requires settlement of questions by the Supreme Court. Universal Camera Corporation v. NLRB, (1951) 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456; Rice v. Souix City Memorial Park Cemetary, (1955) 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614; Goldlawn, Inc. v. Heiman, (1962) 369 U.S. 463, 8 L.Ed.2d 39, 82 S.Ct. 913; Fields v. United States, (1907) 205 U.S. 292, 51 L.Ed. 807, 27 S.Ct. 543.

This case does not involve a question of gravity and general importance. There is no great conflict between decisions of State and Federal Courts or between those of Federal Courts of different circuits and nothing affecting international relations. Rule 17 of the Rules of Court and the case law interpreting 28 U.S.C. 1254 indicate that certiorari should be denied.

WHEREFORE, it is submitted that the Petition for Certiorari filed herein should be denied.

Respectfully submitted,



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